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No. 876

In the Supreme Court of the United States

OCTOBER TERM, 1960

JUAN PEREZ-VARELA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE NEW YORK DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (R. 16–21; Pet. App. B, pp. 8a–12a) is reported at 285 F. 2d 723. The opinion of the district court (R. 9–12; Pet. App. B, pp. 13a–15a) is reported at 187 F. Supp. 378.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1960 (R. 22). A petition for rehearing was denied on January 18, 1961 (R. 41). The petition for a writ of certiorari was filed on April 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Article XXIV of the 1903 treaty between the United States and Spain, providing for the return of deserters from capital ships, is still in force, and, if so, whether its procedures govern the rights of petitioner, a Spanish crewman who deserted a Spanish capital ship in New York harbor.

2. Whether petitioner's arrest and detention complied with the terms of the treaty.

3. Whether petitioner was accorded due process.

STATUTES AND TREATY INVOLVED

The applicable statutes and treaty involved are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit, affirming the order of the District Court for the Southern District of New York denying his application for a writ of *habeas corpus*, by which he sought release from the custody of the New York District Director of Immigration and Naturalization, who is holding him as a deserting Spanish seaman pursuant to Article XXIV of the 1903 Treaty of Friendship and General Relations between this country and Spain, 33 Stat. 2117 (App., *infra*, p. 13).

1. Petitioner, a native and citizen of Spain, who was serving as a sailor aboard a training ship of the Spanish Navy, deserted while the vessel was in the port of New York City during April to early May 1960. On May 10, 1960, the Consul General of Spain

advised the Immigration and Naturalization Service, in writing, of petitioner's desertion. Acting on the Consul's request, the Immigration Service, as stipulated in the treaty, rendered its assistance for "the pursuit and arrest" of petitioner and apprehended him in New York City on July 8, 1960. At the time of his apprehension, petitioner voluntarily informed the officers of the Service of his desertion and stated that his intention to desert in this country was formed some months before while he was still in Spain. Thereafter, on July 11, 1960, petitioner appeared before an officer of the Service who identified himself and stated his authority to administer oaths and take testimony. Petitioner was informed he could make any statement freely and voluntarily and that such statement could be used against him. Petitioner gave his name, but refused to give any further information or to sign a statement of identification (R. 6–7, 9–10, 15, 17–18).

2. On July 14, 1960, petitioner applied to the district court for a writ of *habeas corpus*, asserting, *inter alia*, that he had been denied a hearing by the Immigration and Naturalization Service in violation of his rights under the due process clause, and that his custody was illegal (R. 2–4). On October 4, 1960, the district court denied his application, pointing out that petitioner was not being proceeded against under the immigration and nationality laws of this country, but pursuant to the treaty with Spain, and that "[h]aving been afforded an opportunity to be heard on the only issues * * * which have bearing on his status, to wit, identity and the fact of desertion, peti-

tioner has been accorded due process of law" (R. 11, 9–12). The court of appeals unanimously affirmed, in an opinion by Judge Hand, upon the ground that the 1903 Treaty with Spain was still in force and governed petitioner's rights as a deserter from the crew of a Spanish capital ship (R. 16–21).

ARGUMENT

Article XXIV of the 1903 Treaty of Friendship and General Relations between this country and Spain (App., *infra*, p. 13) provides that seamen on capital ships of either nation who desert in one of the ports of the other shall, at the written request of their nation's consular authorities, addressed to the "competent national or local authorities", be arrested and detained for return to their own country. Petitioner attacks (1) the effectiveness of the treaty, (2) the sufficiency of the procedures followed to constitute compliance with the treaty and (3) the validity of the procedure followed under the due process clause of the Fifth Amendment of the United States Constitution.

1. (*a*) Petitioner contends that the 1903 treaty with Spain does not control this case, having been repealed by the Immigration and Nationality Act of 1952, 66 Stat. 163, and that he is entitled to the procedural protections afforded in deportation proceedings as provided in Section 242 of that Act (Pet. 4–5, 8–10). Petitioner points to no specific language of abrogation, but relies on a claim of repeal by implication. His argument is that since the definition of alien seamen as non-immigrants under Section 101(a)(15)(D) of the 1952 Act is sufficiently broad to include

alien seamen serving on foreign capital ships,[1] that section is inconsistent with the treaty, which is therefore repealed by Section 403(b) of the 1952 Act.[2]

It is inconceivable that Congress would employ the tenuous and indirect method suggested by petitioner to repeal the treaty by implication. Cf. *Chew Heong* v. *United States,* 112 U.S. 536, 549–550. When Congress desires to renounce a treaty, it knows how to do so in precise and certain terms. When, by Section 16 of the Seamen's Act of 1915, 38 Stat. 1184 (App., *infra,* p. 14) Congress decided to abrogate provisions of the numerous treaties (including the one with Spain) insofar as they dealt with desertion of alien seamen from foreign merchant vessels, it did so plainly and directly. It directed the President to notify the treaty nations[3] that it was this government's intention to terminate the treaties, and detailed the method the President should utilize to achieve that end. As a result, as to many countries, all desertion provisions—covering desertion from both capi-

[1] That section defines a non-immigrant as "an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft * * *."

[2] That section reads: "Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed."

[3] A comprehensive list of these deserting seamen treaties in force as of 1902 is contained in *Tucker* v. *Alexandroff,* 183 U.S. 424, 461, n. 1 (dissenting opinion).

tal ships as well as commercial vessels—were abrogated. As to Spain (and Greece), it was specifically agreed after negotiation that only that portion of Article XXIV of the 1903 Treaty which covered desertion from commercial craft would be voided and that treaty obligations dealing with deserters from capital ships would be perpetuated. See V Hackworth, *Digest of International Law*, pp. 309–312, 316–317 [4]; II Hackworth, pp. 248–255; 1 *The Foreign Relations of the United States* (1919), pp. 54–67; *Treaties In Force*, January 1, 1961, p. 76, n. 1, p. 163, n. 2.

With respect to capital ships, therefore, the general provisions of the Immigration and Nationality Act of 1952 cannot be deemed to be an abrogation of the Spanish treaty as re-negotiated. As the present proceeding shows, the executive branch regards the treaty as in force. Besides, even if the Immigration and Nationality Act of 1952 could be read to cover deserters from capital ships, its provisions should be considered applicable only to deserters from ships of nations with whom we do not have a specific treaty covering capital ships, and not as abrogating a treaty which specifically covers the subject. There is a long-accepted doctrine that whenever possible, in construing treaty rights in light of subsequent legislation, that construction should be adopted "which recognize[s] and save[s] rights secured by the treaty" (*Chew Heong* v. *United States*, 112 U.S. 536, 549), the ultimate aim being to "preserve treaty rights unless clearly annulled" (*Cheung Sum Shee* v. *Nagle*, 268 U.S. 336,

[4] Hereinafter cited as "Hackworth."

345–346; see *Johnson* v. *Browne*, 205 U.S. 309, 321; *United States* v. *Payne*, 264 U.S. 446, 448–449). Quite recently the Ninth Circuit in *Medina* v. *Hartman*, 260 F. 2d 569, 572, observed that the desertion of Spanish seamen from a Spanish capital ship would be controlled by the 1903 treaty, and not by the Immigration and Nationality Act of 1952.[5] In view of the pertinent historical material, therefore, there seems no doubt that the Immigration and Nationality Act of 1952 does not control the present case.

(*b*) Petitioner also urges (Pet. 5–7, 12) that if the present proceeding were not a deportation proceeding under the 1952 Immigration and Nationality Act, it would have to be an extradition proceeding with all the attendant statutory procedures applicable in extradition (see 18 U.S.C. 3184–3195). The particular proceeding here, however, is neither one of extradition nor of deportation. It stems from a particular treaty and is governed by the provisions of that treaty. And, although it is true that the present case involves something more analogous to extradition than deportation in the sense that the obligations are treaty-created and that jurisdiction is being exercised by this country to fulfill our just obligations to other powers (see *Grin* v. *Shine*, 187 U.S. 181, 184; *Tucker* v. *Alexandroff*, *supra*), it is not true that the statutory procedures adopted specifically to implement extradition treaties are applicable here.

[5] In *Hartman*, however, the court found the treaty inapplicable because the seamen had not deserted in a port of the United States.

Traditionally, extradition treaties deal with the "surrender * * * of persons residing or found in this country, and charged with crime in another * * *." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714; see *Terlinden* v. *Ames*, 184 U.S. 270, 289; IV Hackworth, pp. 1–2. The treaty provision in the present case deals only with desertion, which is historically separate from the subject matter of extradition treaties. In fact, "desertion is not a *crime* provided for by any of our numerous extradition treaties with foreign nations * * *." *Tucker* v. *Alexandroff*, *supra*, 183 U.S. at 430. Moreover, there is presently in force a treaty of extradition between this country and Spain (35 Stat. 1947) which does not make desertion an extraditable crime, and has never been thought to be a substitute for the 1903 treaty here involved. In short, the procedures adopted by Congress to implement extradition treaties have no application here.[6]

2. Petitioner further avers (Pet. 11–12) that, even if the 1903 treaty controls this case, the procedures followed in effecting his arrest and detention under the treaty were at variance with its terms and with its implementing legislation (Rev. Stat. 5280, 4 Stat. 359, as amended, 10 Stat. 614, App., *infra*, p. 15. But Rev. Stat. 5280, which, in implementing desert-

[6] Consequently, when petitioner urges (Pet. 5–6) that he should have been allowed to make the argument that desertion is a political offense and historically non-extraditable, he is seeking to raise an irrelevant issue. If his argument were sound, it would lead to the paradoxical result that the very act of desertion which triggers the treaty into operation, would at the very same time prevent its application, and thus render it a nullity.

ing-seamen-treaties required judicial authorization for the arrest and detention of deserters, was expressly repealed by Section 17 of the Seamen's Act of 1915 (38 Stat. 1184, App., *infra*, pp. 14–15). See II Hackworth, pp. 248–255.

Besides, even if Rev. Stat. 5280 had not been repealed totally by the express language of Section 17, it would not in any event govern the procedures under the 1903 treaty. The treaty, which was entered into some fifty years after the last Congressional modification of Rev. Stat. 5280, and was renegotiated after 1915 (*supra*, pp. 5–6), provides its own procedures for return of deserting seamen. The treaty would therefore prevail over the earlier legislation. See *Charlton* v. *Kelly*, 229 U.S. 447, 463.

Nor is there merit to petitioner's argument that the language "competent national or local authorities" means only judicial officers. When Congress wants to provide for enforcement of a deserting seamen treaty by a judicial officer, it makes its purpose explicit. See, *e.g.*, Article XXXIV of the 1858 Treaty with Bolivia, 12 Stat. 1020. In the exercise of its clear power in the premises (see *Grin* v. *Shine*, *supra*, 187 U.S. at 191–192; *Fong Yue Ting* v. *United States*, *supra*, 149 U.S. at 714), it did not do so here, and there is no reason to engraft such a limitation in this case. Cf. *Factor* v. *Laubenheimer*, 290 U.S. 276, 294; *Jordan* v. *Tashiro*, 278 U.S. 123, 128–129; *Asakura* v. *Seattle*, 265 U.S. 332, 342; *Tucker* v. *Alexandroff*, *supra*, 183 U.S. at 437.

In the present case, the authorized Spanish authorities made written application to the Immigration

and Naturalization Service requesting petitioner's arrest and detention as a deserting seaman. There has never been any question that petitioner was a crewman serving on a Spanish capital ship and that he deserted from that ship while it was in the port of New York. The Immigration Service whose function it is to apprehend and interrogate aliens (see Section 287 of the 1952 Act) is a competent authority, within the intendment of the treaty, to arrest and detain petitioner. Cf. *Fong Yue Ting* v. *United States, supra; Abel* v. *United States*, 362 U.S. 217, 233–234.

3. Finally, there is no merit to petitioner's argument that the procedures followed in the present case constituted a denial of liberty without due process of law (Pet. 5, 7, 8, 13). There is no question that petitioner was entitled to basic constitutional standards of fairness; the only question is whether, considering the particular circumstances of this case, these standards were met. We submit that they were.

Having been informed, in writing by the Spanish Consul that petitioner was a deserter from the crew of a Spanish capital ship, petitioner, upon such Consul's request, and as provided in Article XXIV of the treaty, was taken into custody by officers of the Immigration Service. At the time of his arrest, petitioner freely admitted that he was Juan Perez-Varela, and that he had deserted from a Spanish capital ship, as the Spanish Consul had previously advised the Service. There was thus clear authority to arrest petitioner as the treaty required. Cf. *Tucker* v. *Alexandroff, supra*, 183 U.S. at 447–448. Moreover, peti-

tioner, in the course of these proceedings, has not contended that he was not the naval deserter sought by Spain (see Pet. App. B, pp. 13a–15a). There has, in short, never been any dispute that the only two conditions relevant to the operation of the treaty—identity and the fact of desertion in a United States port—have been met, and that petitioner was allowed the opportunity to contest the existence of these conditions before the Immigration Service, and before the courts in the *habeas corpus* proceedings.

As we have noted (*supra*, pp. 4–7), the present case is not one in which an alien is being deported under the laws of the United States and is therefore entitled to a formal hearing before his ties with this country may be terminated. Cf. *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212. Rather, the case arises out of a particular treaty, by the terms of which this country has agreed to exercise its sovereignty to return deserting naval seamen to Spain. The test of due process in this case is whether petitioner was accorded the procedures the treaty authorized. There is no doubt that he was; he is entitled to no more. See *Grin* v. *Shine*, *supra*, 187 U.S. at 191; *Fong Yue Ting* v. *United States*, *supra*, 149 U.S. at 714; cf. *Ekiu* v. *United States*, 142 U.S. 651, 660.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Article XXIV of the 1903 Treaty of Friendship and General Relations between this country and Spain, 33 Stat. 2117, provides in pertinent part:

> The Consuls-General, Consuls, Vice-Consuls and Consular-Agents of the two countries may respectively cause to be arrested and sent on board or cause to be returned to their own country, such officers, seamen or other persons forming part of the crew of ships of war or merchant vessels of their Nation, who may have deserted in one of the ports of the other.
>
> To this end they shall respectively address the competent national or local authorities in writing, and make request for the return of the deserter and furnish evidence by exhibiting the register, crew list or other official documents of the vessel, or a copy or extract therefrom, duly certified, that the persons claimed belonged to said ship's company. On such application being made, all assistance shall be furnished for the pursuit and arrest of such deserters, who shall even be detained and guarded in the gaols of the country pursuant to the requisition and at the expense of the Consuls-General, Consuls, Vice-Consuls or Consular Agents, until they find an opportunity to send the deserters home.
>
> If, however, no such opportunity shall be had for the space of three months from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause. It is understood that persons who are citizens or subjects of the country within which the demand is made shall be exempted from the provisions of this article.

* * * * * *

The Seamen's Act of 1915, 38 Stat. 1164, 1184, provides in pertinent part:

> SEC. 16. That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment and any other treaty provision in conflict with the provisions of this Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions.
>
> SEC. 17. That upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent State of the Kongo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and thereupon section fifty-two hundred and eighty and so much of section four thousand and eighty-one of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States

and Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, shall be, and is hereby, repealed.

Rev. Stat. 5280, 4 Stat. 359, as amended, 10 Stat. 614, provides in pertinent part:

> On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. * * *

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